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# Chang Ming Feng & Anor v Jackson Lim @ Jackson ak Bajut

HIGH COURT (MIRI) — CIVIL APPEAL NO 12–07 OF 1997 (MR)
IAN CHIN J
2 NOVEMBER 1998

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***Damages (Personal Injury or Death)*** *— Personal injuries — Respondent awarded damages by sessions court — Part of injuries in award granted not pleaded — Injuries had to be expressly pleaded and proved — Whether injuries not pleaded but adduced as evidence without objection can cure absence of plea*

C

***Damages (Personal Injury or Death)*** *— Personal injuries — Loss of future earnings — Award did not take into account increase in respondent's basic salary — Whether trial judge had erred — Whether offshore allowances were separate from salary*

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The respondent met with an accident and sustained serious injuries which the appellants were held by the sessions court to be wholly liable. When the respondent resumed work, he could only perform light duties and was not able to do offshore work anymore as an offshore production technician. The appellants appealed against the quantum of damages awarded to the respondent in the sessions court. The appeal points out two parts of the award that needs to be reviewed by the court, namely: (i) the sum of RM30,500 for pain, suffering and loss of amenities ('the first appeal'); and (ii) the sum of RM61,560 for loss of earnings ('the second appeal'). On the first appeal, counsel for the appellants contended that part of the injuries in respect of the award granted was not pleaded, namely, three scars suffered by the respondent; therefore, there should not be any award for those injuries and that the sessions court judge had made no allowance for overlapping. In respect of the second appeal, counsel submitted that the sessions court judge, when assessing the loss of the respondent's future earnings, had failed to take into account the increase in his basic salary at the date of the trial. Counsel for the respondent, relying on s 28(2)(c)(ii) of the Civil Law Act 1956 ('the Act'), argued that the increase in the basic pay should not be taken into account and that the respondent's losses were his offshore allowances which were separate from his salary.

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**Held**, dismissing the first appeal and allowing the second appeal:

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(1) Evidence adduced without objection has the effect of curing the absence of a plea in the statement of claim. On the facts, the evidence of the scars was adduced without objection. Furthermore, the quantum in respect of the scars was fully canvassed in the lower court by counsel for both parties. Therefore, there was no merit on the first ground of appeal (see p 5C–D); *Superintendent of Lands & Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 followed.

I

(2) Apart from having to show the failure to take into account the element of overlapping, the appellants must also show that the award was manifestly excessive or unreasonable as to warrant setting aside. On the facts, the appellants failed to show how the award was manifestly excessive or unreasonable and the award could not be regarded as such when the cases showed that much higher awards were given before (see pp 5I and 6A–B).

(3) The trial judge had erred in assessing the loss of future earnings of the respondent by failing to take into account the increase in the basic salary of the respondent at the date of the trial. Section 28A(2)(c)(ii) of the Act does not prevent the court from taking into account the actual increase in the basic salary which the respondent was earning at the date of the trial. The overall earnings must be considered to see whether there was any loss and this would also include the respondent's allowances. As such, the sessions court's award of RM61,500 for loss of future earnings is set aside and substituted by the award of RM10,872 (see pp 6E–F, 7C, F–G and 8F); *Marappan a/l Nallan Koundar & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 followed.

**[Bahasa Malaysia summary**

Penentang telah terlibat dalam suatu kemalangan dan mengalami kecederaan serius yang mana perayu-perayu didapati bertanggungan secara keseluruhan oleh mahkamah sesyen. Apabila penentang bekerja semula, ia hanya boleh melaksanakan tugas ringan dan tidak dapat melakukan kerja luar pesisir lagi sebagai seorang juruteknik pengeluaran luar pesisir. Perayu-perayu merayu terhadap kuantum ganti rugi yang diawardkan kepada penentang di mahkamah sesyen. Rayuan menandakan dua bahagian award yang perlu dikaji semula oleh mahkamah, iaitu: (i) jumlah RM30,500 untuk kesakitan, penderitaan dan kehilangan kemudahan ('rayuan pertama'); dan (ii) jumlah sebanyak RM61,560 untuk kehilangan mata pencarian ('rayuan kedua'). Mengenai rayuan pertama, peguam perayu-perayu menghujahkan bahawa sebahagian kecederaan berkenaan dengan award yang diberikan tidak dihujahkan, yakni, tiga parut yang dialami oleh penentang; maka, tidak seharusnya terdapat apa-apa award untuk kecederaan tersebut dan bahawa hakim mahkamah sesyen telah tidak membuat sebarang peruntukan untuk pertindihan. Berkenaan rayuan kedua, peguam berhujah bahawa hakim mahkamah sesyen, ketika menilai kehilangan mata pencarian masa depan penentang, telah gagal mengambil kira tambahan dalam gaji asas pada tarikh perbicaraan. Peguam penentang, dengan bergantung pada s 28(2)(c)(ii) Akta Undang-Undang Sivil 1956 ('Akta tersebut'), berhujah bahawa tambahan dalam gaji asas tidak harus diambil kira dan bahawa kehilangan penentang adalah elaun luar pesisir yang berasingan daripada gajinya.

A **Diputuskan**, menolak rayuan pertama dan membenarkan rayuan kedua:

(1) Keterangan yang dikemukakan tanpa bantahan mempunyai kesan mengubati ketiadaan hujah dalam pernyataan tuntutan. Atas fakta-fakta, keterangan mengenai parut-parut tersebut telah dikemukakan tanpa bantahan. Tambahan pula, kuantum berkenaan dengan parut-parut telah dihujahkan sepenuhnya di mahkamah rendah oleh peguam kedua-dua pihak. Maka, tiada merit atas alasan pertama rayuan (lihat ms 5C–D); *Superintendent of Lands & Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 diikut.

(2) Selain daripada keperluan untuk menunjukkan kegagalan untuk mengambil kira unsur pertindihan, perayu-perayu mestilah juga menunjukkan bahawa award tersebut jelas melebihi atau tidak munasabah hinggakan mewajarkan penepian. Atas fakta-fakta, perayu-perayu telah gagal menunjukkan bagaimana award tersebut adalah terlampau keterlaluan atau tidak munasabah dan award tersebut tidak boleh dianggap sedemikian apabila kes menunjukkan bahawa award yang lebih tinggi pernah diberikan (lihat ms 5I dan 6A–B).

(3) Hakim perbicaraan telah silap dalam menaksir kehilangan mata pencarian masa depan penentang dengan kegagalan untuk mengambil kira gaji asas penentang pada tarikh perbicaraan. Seksyen 28A(2)(c)(ii) Akta tersebut tidak menghalang mahkamah daripada mengambil kira tambahan sebenar dalam gaji asas yang didapati oleh penentang pada tarikh perbicaraan. Mata pencarian keseluruhan mestilah dipertimbangkan untuk melihat sama ada terdapat sebarang kehilangan dan ini akan juga termasuk elaun penentang. Oleh itu, award mahkamah sesyen sebanyak RM61,500 untuk kehilangan mata pencarian depan diketepikan dan diganti dengan award RM10,872 (lihat ms 6E–F, 7C, F–G dan 8F); *Marappan a/l Nallan Koundar & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 diikut.]

## Notes

For cases on loss of future earnings, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 596–608.

## Cases referred to

*Billingham v Hughes* [1949] 1 KB 643 (refd)

*Lau Ee Ee v Tang King Kwong* [1986] 1 MLJ 308 (refd)

*Mahamad bin Mahamad Said & Anor v Perianayagam & Anor* [1972] 1 MLJ 67 (refd)

*Marappan a/l Nallan Koundar & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 (folld)

*Nagarajan a/l Veerapan v Ananthan a/l Parama Sivam & Ors* [1989] 2 CLJ 1243 (refd)
*Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30 (refd)
*Owners of MV 'Kohekohe' & Ors v Supardi bin Sipan, The 'Kohekohe'* [1985] 2 MLJ 422 (refd)
*Superintendent of Lands & Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 (folld)
*Tiong Ing Chiong v Giovanni Vinetti* [1984] 2 MLJ 169 (refd)

**Legislation referred to**

Civil Law Act 1956 s 28A(2)(c)(i), (ii)

*Marina Foo* (*Tang & Partners*) for the appellants.
*MS Sandhu* (*MS Sandhu & Co*) for the respondent.

*Cur Adv Vult*

**Ian Chin J**:

*Introduction*

This is an appeal by Chang Ming Feng and Sim Ah Hong @ Sim Geok Hong ('the appellants') against the quantum of damages awarded to Jackson Lim @ Jackson ak Bajut ('the respondent'), in a negligence suit by the sessions court, in a judgment handed down on 10 May 1997. The relevant part of the award that the appellants wanted the court to disturb is: (1) the sum of RM30,500 for pain, suffering and loss of amenities; and (2) the sum of RM61,560 for loss of earnings.

*Facts of case*

The facts that need detain our attention are these. The respondent was and still is an employee of Sarawak Shell. On 30 May 1993, he was driving a vehicle when he met with an accident and sustained serious injuries which the appellants were held by the sessions court to be wholly liable. The respondent was thereafter on sick leave for four months and when he resumed work, he could only perform light duties and was not able to do offshore work anymore as an offshore production technician, which work would earn him offshore allowances, namely, roster allowance, fixed overtime allowance and location allowance. I turn now to the grounds of appeal concerning the award for pain, suffering and loss of amenities.

*Pain, suffering and loss of amenities*

The sum of RM30,500 that was awarded for pain, suffering and loss of amenities is made up of RM3,500 for lacerated wound and three scars, RM8,000 for fracture of right femur (closed comminuted), RM8,000 for fracture of left femur (comminuted) and RM11,000 for fracture of patella with residual disabilities of the right knee. Ms Marina Foo, learned counsel for the appellants, argued that the three scars were not pleaded and

A therefore there should not be any award for those injuries. The award of RM3,500 should on account of that be reduced to RM1,000. The learned sessions court judge conceded that the scars were not pleaded and referred to *Lau Ee Ee v Tang King Kwong* [1986] 1 MLJ 308, where Chong Yik Liong J at p 310 said:

B > In my view, in a running down action where negligence is proved or admitted, a plaintiff is entitled to be awarded damages only in respect of injuries which are pleaded and which are proved, or admitted, to have been caused by the negligence of the defendant.

What is said in that case must be read in the light of the Supreme Court C decision of *Superintendent of Lands & Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185, which held that evidence adduced without objection has the effect of curing the absence of a plea in the statement of claim. In this case, the evidence of the scars was adduced without objection. Furthermore, the quantum in respect of the scars was fully canvassed in the lower court by counsel for both parties. Therefore, D there is no merit in this ground of appeal.

The next ground of appeal concerning this head of award is that the learned sessions court judge had made no allowance for overlapping, citing *Mahamad bin Mahamad Said & Anor v Perianayagam & Anor* [1972] 1 MLJ 67 at p 68, where it was said:

E > ... we do not think that the learned judge should have taken compensation for each of the two injuries suffered by the plaintiff separately and then just have added them up at the end. The items are not separate heads of compensation. They are only aids at arriving at a fair and reasonable compensation. See *Fletcher v Autocar and Transporters Ltd* [1968] 1 All ER 726 at p 733. There is an element of overlapping when two or more injuries are suffered F simultaneously.

Mr MS Sandhu, learned counsel for the respondent replied that the learned sessions court judge must have taken overlapping into account because 'there were higher awards for similar injuries which she did not follow'. The learned sessions court judge had followed the submission of Mr Sandhu in G itemizing the awards but did not follow the figure of RM38,500 prayed for by Mr Sandhu. She, it will be recalled, only awarded RM30,500. Could it then be assumed that she had given the sum of RM30,500 instead of RM38,500 to take into account the overlapping? In my view, no such assumption can be had when what was required was an express statement that she had taken into consideration the element of overlapping. There was H no such expression in her judgment. Furthermore, I am of the respectful view that she had been led into the error because learned counsel, when making his submission at the lower court also did not take note of this element of overlapping. The lesser figure she awarded could very well be due to the fact that the cases cited by Ms Foo supported such a lower figure. But the appellants carry the further burden of showing that the award was I manifestly excessive or unreasonable because apart from having to show the failure to take into account the element of overlapping, it must also be shown that the award was manifestly excessive or unreasonable as to

warrant setting aside (*Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30). Ms Foo did not show how the award can be said to be manifestly excessive or unreasonable and I cannot see how the award can be regarded as such when the cases show that much higher awards were given before. I find no merit in this ground of appeal. This takes me to the last ground of appeal which is with regards to the loss of future earnings.

*Loss of future earnings*

Before the accident, the respondent was, in 1993, working offshore and earning a monthly pay of RM2,432.28 which was made up of basic salary of RM1,657 and offshore allowances of RM775.28. At the time of the trial in 1995, the respondent could no longer work offshore but his monthly pay was then RM2,256.78 which was made up of his basic salary of RM2,009 and allowances of RM247.78. The learned sessions court judge was of the view that the offshore allowances of RM775.28, that the respondent could no longer earn, constituted a loss of earnings. For the purpose of arriving at a multiplicand, she deducted from that sum of RM775.28, the allowances of RM247.78 which the respondent was earning at the time of trial, and a further sum of RM100 for living expenses. This leaves the multiplicand of RM427.50 (RM775.28 – RM247.78 – RM100) which produced, after applying the multiplier of 12 years, the said award of RM61,560 for loss of future earnings. She did not take into account the increase of RM352 in the basic salary at the date of trial.

Miss Foo submitted the multiplicand adopted by the sessions court judge was incorrect as she failed to take into account the increase in the basic salary of the respondent at the date of the trial. Miss Foo submitted that if the increase in basic pay was taken into account, the difference in the income of the respondent before the accident and at the time of the trial would be only RM175.50 instead of RM775.28. Learned counsel further contended the multiplicand should only be RM75.50 after deduction of RM100 for living expenses.

Mr Sandhu for the respondent argued that the increase in basic pay should not be taken into account, as the basic pay would go up in any event. What the respondent lost because of the accident was his offshore allowances totalling RM775.50 and that is separate from his salary. Mr Sandhu also referred to s 28A(2)(c)(ii) of the Civil Law Act 1956 ('the Act') which says:

> ... in awarding damages for loss of future earnings the Court shall take into account—
>
> (i) ...
>
> (ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future; ... .

Mr Sandhu is treating the allowances as different from salary in order, firstly, to take advantage of the fact that the respondent was earning less allowances and, secondly, to disregard the increase in the basic salary as at

A the trial. That approach is not permissible because what the court must take into account is the 'earnings' of which salaries would without argument constitute such. This leaves the question of the 'allowances' and whether they constitute 'earnings'. Mr Sandhu did not argue why the 'allowances' cannot be 'earnings' but the fact that the respondent is claiming loss of future earnings in respect of those allowances, defeats any argument that B such allowances cannot be earnings. In *Marappan a/l Nallan Koundar & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99, the Supreme Court held that allowances given to a teacher while being trained as a teacher were 'earnings' within the meaning of s 28A(2)(c)(i) of the Act. Thus, I do not see how in the present case, the 'allowances' cannot be treated as 'earnings'. C It was also held in *Nagarajan a/l Veerapan v Ananthan a/l Parama Sivam & Ors* [1989] 2 CLJ 1243 at p 1246, that such allowances are earnings. Therefore, since allowances are also earnings, the overall earnings must be considered to see whether there was any loss.

It was then contended by Mr Sandhu that s 28A(2)(c)(ii) of the Act D prevents the court from taking into account the increase in the basic salary which amounted to RM352. Does that section, then, have the effect of preventing the court from taking into account the increase in salary at the date of trial? Mr Sandhu did not refer to any authorities. That section came into force on 1 October 1984. The law has been that a plaintiff must give credit for what he will actually receive (*Billingham v Hughes* [1949] 1 KB E 643; *Tiong Ing Chiong v Giovanni Vinetti* [1984] 2 MLJ 169; *Owners of MV 'Kohekohe' & Ors v Supardi bin Sipan, The 'Kohekohe'* [1985] 2 MLJ 422). In my view, s 28A(2)(c)(ii) of the Act does not in any way change that aspect of the law. The language of that section also makes it clear when it talks of 'prospect of the earnings as aforesaid being increased at some time in the future' which the court must not speculate. It does not say that the F court should ignore the reality of the situation where the appellants' basic salary, a constituent part of the 'earnings', had been increased at the date of trial. The increase in that part of the earnings is actual, not prospective. Therefore, I am of the view that s 28A(2)(c)(ii) of the Act does not prevent the court from taking into account the actual increase in the basic salary G which the respondent was earning at the date of trial in order to arrive at a just award since that section applies to a prospective or speculative situation and not the actual. Conversely, that section should also not prevent the taking into account of the fact that the respondent, if he had continued in his previous job, would have commanded an increased in salary due to increment, if there is evidence of such. Is there, then, any evidence that the H respondent, if he had continued in his previous position would have commanded the same basic salary in 1993 as in his new position? In this regard, Mr Sandhu contended that there is no evidence that the respondent's basic salary, if he had continued in that position till the date of trial would not, by increments, have increased to the basic salary that the respondent was earning as in 1995. That, in my view, is asserting in a I pregnant negative way that the respondent's basic salary in 1993 would have increased in 1995. Since that is the respondent's assertion, he carries the burden of proving it and not otherwise as contended by Mr Sandhu. It

is a notorious fact that no salary would remain static and also that there will be a maximum salary unless there is a promotion. Even though there is, in p 101 of the appeal record, evidence in the form of a document called 'SSB Sarawak Shell Employees Union Collective Agreement' enumerating the starting salary and the maximum salary of 11 different scales of salary, it is not clear to which scale the respondent belongs in 1993 and in 1995 and whether he had reached the maximum salary. Therefore, even assuming that I can resort to this evidence, which neither learned counsel has referred to, I am still unable to say that the 1993 salary was not the maximum salary. Unless it can be established that he had not reached the maximum salary, can it then be said that there will be annual increment. Even if it can be established that he has not reached his maximum salary, then it will be necessary to determine the amount of the annual increment since there are 11 scales with 11 different annual increments ranging from RM44 to RM89. Even taking the highest increment of RM89, it would still not make up for the difference of RM352 between the 1993 and 1995 salaries since three years increment would only give RM267. Therefore, I am unable to find any evidence to support the summation that the basic salary that the respondent earned in 1993 (before the accident) would, on account of increment, have matched that of the salary earned by the respondent in 1995 and that, therefore, the increase in the basic salary should be ignored. Consequently, Ms Foo is correct in her contention that the lower court has erred when it failed to take into account the increase of RM352. Therefore, the multiplicand should only be RM75.50 and when applied with the multiplier of 12 should result only in an award of RM10,872.

*Conclusion*

In the premises, I would allow the appeal to the extent I have indicated, which is that the lower court's award of RM61,500 for loss of future earnings is set aside and in its place the award of RM10,872 is substituted. Costs to the appellant.

*First appeal dimissed. Second appeal allowed.*

Reported by Mohd Rizal Abidin